No. 99-1871

In the Supreme Court of the United States

NOV 9 2000

UNITED STATES DEPARTMENT OF THE INTERIOR AND BUREAU OF INDIAN AFFAIRS, PETITIONERS

v.

KLAMATH WATER USERS PROTECTIVE ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether confidential communications between Indian Tribes and the Bureau of Indian Affairs, in connection with the federal government's performance of its trust responsibility to protect and manage tribal water rights, are "intra-agency" documents that may be protected from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 189 F.3d 1034. The decision of the district court (Pet. App. 31a-32a) adopting the findings and recommendation of the magistrate judge is unreported. The findings and recommendation of the magistrate judge (Pet. App. 33a-71a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1999. A petition for rehearing was denied on December 22, 1999 (Pet. App. 72a-73a). On March 10, 2000, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including April 20, 2000. On April

10, 2000, Justice O'Connor further extended the time for filing to and including May 20, 2000. The petition was filed on May 22, 2000 (a Monday) and was granted on September 26, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), provides:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. IV 1998), generally mandates disclosure upon request of records held by an agency of the federal government. Section 552(b), however, identifies several categories of records that are exempt from compelled disclosure. In particular, FOIA Exemption 5, 5 U.S.C. 552(b)(5), authorizes an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption 5 protects from compelled disclosure "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). This case primarily involves the application of Exemption 5 to documents that were created outside the government but were provided to federal agency officials at the agency's request

and were used by the government in its internal deliberations.[1]

For purposes of the FOIA, the term "agency" is defined to mean (with exceptions not relevant here) "each authority of the Government of the United States," 5 U.S.C. 551(1), "includ[ing] any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency," 5 U.S.C. 552(f)(1) (1994 & Supp. IV 1998). The courts of appeals that have considered the question have uniformly concluded that at least under some circumstances, a document prepared outside the government may qualify as an "intra-agency memorandum[]" within the meaning of Exemption 5. See Pet. App. 21a (Hawkins, J., dissenting) (citing cases). In *United States Department of Justice* v. *Julian*, 486 U.S. 1 (1988), three Members of this Court endorsed the approach to Exemption 5 taken by the courts of appeals:

> [T]he most natural meaning of the phrase "intra-agency memorandum" is a memorandum that is addressed both to and from employees of a single agency—as opposed to an "inter-agency memorandum," which would be a memorandum between employees of two different agencies. The problem with this interpretation is that it excludes many situations where Exemption 5's purpose of protecting the Government's deliberative process is plainly applicable. Consequently, the Courts of Appeals have uniformly rejected it, holding the "intra-agency memorandum" exemption applicable to such matters as information furnished by Senators to the Attorney

[1] Six of the seven documents currently at issue fit that description. The seventh was prepared within the agency and was then provided to persons outside the government. See p. 11, *infra*.

General concerning judicial nominations, see *Ryan* v. *Department of Justice*, 199 U. S. App. D. C. 199, 207-209, 617 F. 2d 781, 789-791 (1980), and reports prepared by outside consultants, see *Government Land Bank* v. *GSA*, 671 F. 2d 663, 665 (CA1 1982). It seems to me that these decisions are supported by a permissible and desirable reading of the statute. It is textually possible and much more in accord with the purpose of the provision, to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency—*e.g.*, in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an agency) that is authorized or required to provide advice to the agency.

Id. at 18 n.1 (Scalia, J., joined by White & O'Connor, JJ., dissenting). The Court in *Julian* did not address the question whether the relevant documents were "inter-agency or intra-agency" records within the meaning of Exemption 5, see *id.* at 11 n.9, since it concluded that the documents would be routinely discoverable in civil litigation and therefore would not be covered by the Exemption in any event, see *id.* at 11-14.

2. This Court has frequently recognized that "Indian tribes occupy a unique status under our law." *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). "Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection." Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (1998). A central feature of that duty of protection is the trust responsibility of the United States to protect the land, water, and other natural resources of Indian Tribes. See, *e.g.*, *United States* v.

Cherokee Nation, 480 U.S. 700, 707 (1987); *United States* v. *Mitchell*, 463 U.S. 206, 225 (1983); *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942).

Congress has directed the Secretary of the Interior to "[a]ppropriately manag[e] the natural resources located within the boundaries of Indian reservations and trust lands." 25 U.S.C. 162a(d)(8). Congress has also declared that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government." 25 U.S.C. 3601(2). In addition, Congress has required federal agencies to develop effective processes to permit tribal officers to provide meaningful and timely input in the development of regulatory proposals. 2 U.S.C. 1534(a) (Supp. IV 1998).[2] The Bureau of Indian Affairs (BIA), an agency located within the Department of the Interior (DOI), is the federal agency with primary responsibility for administering land and water held in trust for the Indian Tribes. 25 U.S.C. 1a; 25 C.F.R. subch. H, Pts. 150-181; see *Nevada* v. *United States*, 463 U.S. 110, 127 (1983).

The trust relationship between the United States and the Tribes with respect to Indian resources "is one of the primary cornerstones of Indian law." F. Cohen, *Handbook of Federal Indian Law* ch. 2, § C2a, at 220-21 (1982 ed.). It has been analogized to the relationship existing under a common law trust, with the United States as trustee, the Indian Tribe (or individual Indians) as beneficiary, and the

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[2] Section 1534(a) provides:

> Each agency shall, to the extent permitted in law, develop an effective process to permit elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf) to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates.

property and natural resources as the trust corpus. See *Mitchell*, 463 U.S. at 225. Accordingly, this Court has looked to traditional trust doctrine for guidance in defining the scope of the trust responsibility of the United States to Indian Tribes. See, *e.g.*, *Mitchell*, 463 U.S. at 225 & n.30; *United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Seminole Tribe*, 316 U.S. at 296.

In November 1993, the Secretary of the Interior directed all bureaus and offices within the Department of the Interior (DOI) to "be[] aware of the impact of their plans, projects, programs or activities on Indian trust resources," and "to consult with the recognized tribal government with jurisdiction over the trust property that the proposal may affect * * * if their evaluation reveals any impact on Indian trust resources." J.A. 53. In April 1994, President Clinton issued a memorandum imposing similar requirements on all executive departments and agencies. J.A. 49-51. In May 1998, the President issued an Executive Order, entitled "Consultation and Coordination with Tribal Governments," that directs federal agencies to "establish regular and meaningful consultation and collaboration with Indian tribal governments in the development of regulatory practices" that affect tribal governments. Exec. Order No. 13,084, 63 Fed. Reg. at 27,655.[3]

[3] A new Executive Order issued on November 6, 2000, will take effect 60 days from the date of its issuance (January 5, 2001), at which time Executive Order No. 13,084 will be revoked. See Exec. Order, "Consultation and Coordination with Indian Tribal Governments" §§ 9(c) and 9(d) (Nov. 6, 2000). Like Executive Order No. 13,084, the new Executive Order directs federal agencies to engage in consultation with tribal governments regarding matters of importance to the Tribes. See § 5(a) ("Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."). The Order further provides that "[a]gencies shall respect Indian tribal self-government and sovereignty,

The Secretary's November 1993 directive has been incorporated into the Departmental Manual governing the DOI. The Manual states that "[i]t is the policy of the Department of the Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety." J.A. 55. Accordingly, the Manual directs that "[a]s part of the planning process, each bureau and office must identify any potential effects on Indian trust resources" in order to ensure that such effects can "be explicitly addressed in the planning/decision documents." J.A. 57. The Manual further provides that

> [i]n the event an evaluation reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal government(s) * * *. Information received shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government(s).

J.A. 57-58.

3. This case primarily involves documents submitted to petitioner BIA by the Klamath Indian Tribes. Pursuant to an 1864 treaty, the Klamath Tribes retain fishing and hunting rights on lands that were previously part of the former

honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments." *Id.* § 3(a).

Klamath Indian Reservation in Oregon. See Treaty Between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 707; *Kimball* v. *Callahan*, 493 F.2d 564, 566 (9th Cir.), cert. denied, 419 U.S. 1019 (1974).[4] In *United States* v. *Adair*, 723 F.2d 1394 (9th Cir.), cert. denied, 467 U.S. 1252 (1984), the court of appeals held that the hunting and fishing rights reserved to the Klamath Tribes by the 1864 treaty carry with them an implied reservation of water rights, "with a priority date of immemorial use, sufficient to support exercise of treaty hunting and fishing rights." *Id.* at 1415; see *id.* at 1408-1415. The court in *Adair* explained that

> the right to water reserved to further the Tribe's hunting and fishing purposes is unusual in that it is basically non-consumptive. The holder of such a right is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses (absent independent consumptive rights). Rather, the entitlement consists of the right to prevent other appropriators from depleting the streams[']waters below a protected level in any area where the non-consumptive right applies.

Id. at 1411 (citation omitted).

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[4] In 1954, the Klamath Indian Reservation in Oregon was terminated pursuant to the Klamath Termination Act, see Act of Aug. 13, 1954, ch. 732, § 1, 68 Stat. 718 (codified at 25 U.S.C. 564). Under the 1954 Act, the Klamath Tribes' reservation lands were disposed of to private parties, individual Indians, and federal agencies, but the Tribes' hunting and fishing rights remained intact. See, *e.g.*, *United States* v. *Adair*, 723 F.2d 1394, 1411-1412 (9th Cir.), cert. denied, 467 U.S. 1252 (1984); *Kimball*, 493 F.2d at 566-570. In 1986 the Klamath Tribes were restored as a federally recognized tribal entity. See Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (codified at 25 U.S.C. 566 *et seq.*).

4. Although federal reserved water rights for an Indian Tribe derive from and are defined by federal law, determinations regarding the existence and quantity of such reserved water rights may be made in the context of a general stream adjudication in state court, pursuant to the waiver of sovereign immunity in the McCarran Amendment, 43 U.S.C. 666. See, *e.g.*, *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976); *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983). The State of Oregon has established a statutory procedure to determine the surface water rights of all claimants in the Klamath River Basin in Oregon. See *United States* v. *Oregon*, 44 F.3d 758, 762-764 (9th Cir. 1994), cert. denied, 516 U.S. 943 (1995). In *United States* v. *Oregon*, the court of appeals held that the waiver of federal sovereign immunity contained in the McCarran Amendment applied to the Oregon proceeding. 44 F.3d at 763-770.

The United States is thus a party to the Oregon adjudication and, in addition to asserting water rights on its own behalf, has an affirmative obligation to assert water rights claims on behalf of the Klamath Tribes. See *United States* v. *White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986); J.A. 34-35. The BIA has therefore engaged in extensive consultation with the Tribes, including the exchange of legal analyses and theories regarding the scope of the claims submitted by the United States on the Tribes' behalf. J.A. 35-36. The Department of Justice, on behalf of the BIA, then submitted claims in the Oregon state adjudication for the benefit of the Klamath Tribes. The adjudication remains pending.

5. The Bureau of Reclamation (BOR), an agency located within the DOI, administers the Klamath Project. The Project uses water from the Klamath River Basin to irrigate more than 200,000 acres in Klamath County, Oregon, and two northern California counties, primarily for agricultural

purposes. Pet. App. 14a, 35a; see *Bennett* v. *Spear*, 520 U.S. 154, 158-159 (1997). In 1995, DOI began efforts to develop the Klamath Project Operations Plan (KPOP or Operations Plan), a long-term operations plan for the Project. *Id.* at 14a-15a, 35a.

In connection with those efforts, DOI entered into a memorandum of agreement (MOA) with the Klamath, Hoopa Valley, Karuk, and Yurok Tribes (collectively Klamath Basin Tribes). See J.A. 59-65.[5] Consistent with the President's memorandum of April 1994 and the Secretary's directive of November 1993 (see p. 6, *supra*), the MOA recognized that "[t]he United States Government has a unique legal relationship with Native American tribal governments." J.A. 59. The MOA further recognized that "[w]ith respect to the development of the KPOP, the government-to-government relationship" between the United States and the Tribes requires "[a]ssessment, in consultation with the Tribes, of the impacts of the KPOP on Tribal trust resources." J.A. 60-61. The MOA observed that "[t]his involvement of the Tribes is a major means of assuring that the development of the KPOP reflects the United States' trust obligations and Tribal rights." J.A. 63.

6. Respondent is a non-profit association consisting primarily of Klamath Project irrigators. In 1996, respondent filed a series of FOIA requests with the BIA, seeking access to all communications between the BIA and the Klamath Basin Tribes regarding water resources issues. Pet. App. 2a-3a, 16a-19a, 37a-38a. The BIA released several documents, but it withheld others as exempt under the attorney-work-product and deliberative-process privileges protected by FOIA Exemption 5. Pet. App. 40a. Plaintiff then brought this action against the DOI and the BIA under 5 U.S.C. 552(a)(4)(B) (1994 & Supp. IV 1998) to compel the release of the documents.

[5] The Hoopa Valley, Karuk, and Yurok Tribes have reservation lands downstream along the Klamath River or other lands held in trust in California. See, *e.g.*, *Mattz* v. *Arnett*, 412 U.S. 481 (1973). Those Tribes have an interest in the operation of the Klamath Project because water flows in the River affect hunting and fishing by those Tribes. See Pet. App. 2a.

By the time the district court ruled in this case, seven documents remained in dispute. See Pet. App. 3a, 41a-42a. Three of the documents specifically address issues involved in the development of the KPOP; three were intended to assist the government in representing the Tribes in the Oregon adjudication; and the seventh addresses both proceedings. See *id.* at 41a-49a; J.A. 40-48. Six of the documents were prepared by the Klamath Tribes or their representative and were submitted to the BIA (or, in one instance, to DOI's Regional Solicitor, see Pet. App. 45a) at the agency's request. See Pet. App. 41a-49a; J.A. 40-48. The seventh document was prepared by a BIA official and was provided to attorneys for the Klamath and Yurok Tribes. Pet. App. 43a-44a; J.A. 41-43.[6]

The case was referred to a magistrate judge, who recommended that the government's summary judgment motion be granted on the ground that the documents in question are protected by Exemption 5. Pet. App. 33a-71a. As an initial matter, the magistrate judge concluded that all of the documents satisfied the threshold requirement for protection under Exemption 5—namely, that they are "inter-agency or

[6] The Ninth Circuit has repeatedly held that the Yurok Tribe has fishing rights in the Klamath Basin. See, *e.g.*, *Parravano* v. *Babbitt*, 70 F.3d 539, 545-546 (1995), cert. denied, 518 U.S. 1016 (1996). Although no court has adjudicated the Yurok Tribe's water rights, the United States has consistently taken the position that under the reasoning of *Adair* and other precedents of the Ninth Circuit and this Court, the Tribe has in-stream flow rights sufficient to support its fishing rights.

intra-agency memorandums or letters." The magistrate judge explained:

> [A]ll the documents in question qualify as inter-agency or intra-agency documents under the "functional test". All the documents played a role in the agency's deliberations with regard to the current water rights adjudication and/or the anticipated [KPOP]. Most of the documents were provided to the agency by the Tribes at the agency's request. Disclosure of these documents would expose the agency's decision-making process and discourage candid discussion within the agency undermining the agency's ability to function.

Id. at 59a.

The magistrate judge further concluded that all of the documents are protected by an applicable privilege and therefore "would not be available by law to a party * * * in litigation with the agency." Specifically, the magistrate judge found that all of the documents were covered by the deliberative-process privilege, Pet. App. 56a-61a, and that two of the documents (involving the Oregon adjudication) were covered by the attorney-work-product privilege as well, *id.* at 61a-65a. The district court adopted the findings and recommendation of the magistrate judge. *Id.* at 31a-32a.

7. The court of appeals reversed. Pet. App. 1a-30a. The court acknowledged that the District of Columbia Circuit has adopted a "functional" approach to Exemption 5, under which a document generated outside the government may under some circumstances be regarded as an "intra-agency" memorandum. *Id.* at 6a-8a; see pp. 3-4, *supra*. The court declined, however, to decide whether that approach to Exemption 5 is appropriate. *Id.* at 8a. Rather, the court found it dispositive that "the Tribes with whom the Department has a consulting relationship have a direct interest in

the subject matter of the consultations. The development of the KPOP and the Oregon water rights adjudication will affect water allocations to the Tribes as well as those to members of the Association." *Ibid.* The court concluded that because "the matters with respect to which [DOI] sought advice were matters in which the Tribes had their own interest and the communications presumptively served that interest," *id.* at 9a, the Tribes' submissions to the BIA could not properly be regarded as "inter-agency or intra-agency" documents, *id.* at 10a. The court stated that "[t]o hold otherwise would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the [DOI]." *Ibid.*

Judge Hawkins dissented. Pet. App. 11a-30a. He explained:

> Where the Bureau and Department are, by law, required to represent the interests of Indian Tribes, the majority's holding stands as a barrier to that representation. The majority implies that status as a federally recognized Indian Tribe, and the U.S. government's trust responsibilities to the Tribes, create not a cooperative, but an adversarial relationship between the government and the Tribe, and thus FOIA can be used to destroy any opportunity for "open and honest" consultation between them. * * * I simply cannot agree with a notion I think so fundamentally wrong.

Id. at 12a-13a. Judge Hawkins also concluded that "[t]he affidavits from Department and Bureau employees, accepted by the court below, confirm that these communications spring from a relationship that remains consultative rather than adversarial, a relationship in which the Bureau and Department were seeking the expertise of the Tribes, rather than opposing them." *Id.* at 25a-26a. He observed as well that the majority's conception of the relationship between

the Tribes and the agency in this case "fails to recognize or address that at least four of the seven documents were used by the Bureau and the Department to prepare to represent the Tribes' claims in the Oregon water rights adjudication—not a proceeding which either the Bureau, or the Interior Department, has the authority to 'resolve.'" *Id.* at 23a n.4.

SUMMARY OF ARGUMENT

Under the court of appeals' decision, federal agencies will be compelled to disclose communications from Indian Tribes bearing on the United States' management and protection of tribal trust resources, notwithstanding the established principle that a trustee may not reveal information provided by the beneficiary when to do so would disserve the beneficiary's interests. Neither the text, the history, nor the purposes of the FOIA support that result.

I. In enacting Exemption 5 of the FOIA, Congress recognized the government's substantial interest in preserving the confidentiality of its deliberative processes. The courts of appeals have consistently held that documents submitted by outside consultants may properly be treated as "inter-agency or intra-agency memorandums or letters" within the meaning of Exemption 5 if they play essentially the same role in the agency's decisionmaking process as documents prepared by an agency employee.

That approach is consistent with established principles of FOIA administration. Since release of documents prepared by outside consultants may cause the same harms as disclosure of agency-generated records, treating the two similarly comports with this Court's repeated emphasis upon the need for rules of FOIA administration that accommodate the practical exigencies of government. That approach also lessens the risk that the FOIA will be used to circumvent discovery rules to obtain materials that would ordinarily be privileged in civil litigation. Protection of such records also

ensures that federal officials who are assigned trust or representational duties with respect to persons outside the government can faithfully comply with the rules that govern trustees and representatives generally.

In determining whether documents generated outside the government may properly be regarded as "intra-agency memorandums," the courts of appeals have focused on whether the source of the relevant records is an appropriate person for the agency to consult with respect to the matter to which the documents pertain. That inquiry turns largely on (a) whether a basic congruence of interests exists between the agency and the source of the documents, or (b) whether the agency is obligated by law or has reasonably undertaken to accord a special duty of loyalty, protection, or respect to the person who created the documents. This Court has also suggested that the "intra-agency" character of particular records may be informed in part by whether the documents are intended for the internal assistance or guidance of agency officials (as distinguished from documents that articulate rules of conduct binding on persons outside the government). Those criteria are satisfied in this case.

II. Compelled disclosure of documents like those at issue here would impair the United States' performance of its trust responsibilities. If the prospect of disclosure caused Tribes to be less thorough or candid in their submissions, federal officials will lack information bearing on their ability to manage and protect trust property. And even if there were somehow grounds to believe that the content of tribal submissions would be unaffected by the prospect of public disclosure, compelled release would impair the agency's performance of its assigned functions, because protection of the beneficiary's confidences is itself a significant component of the government's trust responsibilities. Such disclosures do not simply harm the Tribes and tribal members; they

disserve the substantial public and governmental interest in the United States' fulfillment of its trust obligations.

Although a private party's financial or similar stake in the outcome of a government decision may sometimes preclude the application of Exemption 5 to its submissions, the Tribes' "direct interest" in trust property cannot have that effect. To the contrary, a trustee's distinct responsibilities—including the duty to maintain confidentiality where disclosure would harm the beneficiary's interests—run precisely to those persons having an interest in the trust corpus. Far from supporting a rule of compelled disclosure, an Indian Tribe's "direct interest" in the trust property makes it a particularly appropriate "consultant" with respect to the BIA's performance of its trust responsibilities.

Contrary to the court of appeals' holding, the tribal submissions in this case cannot reasonably be characterized as "ex parte communications" to the federal government. The error in the court's analysis is particularly clear with respect to the documents pertaining to the Oregon adjudication, where the federal government does not act as decisionmaker but instead presents claims (on its own behalf and on behalf of Tribes) for ultimate resolution by state officials. The court's decision places the Klamath Tribes at a distinct disadvantage vis-a-vis other claimants in the Oregon adjudication, who may continue to assert all available privileges with respect to documents passing between themselves and their own representatives. The court's "ex parte communications" rationale is also erroneous with respect to the documents prepared in connection with the KPOP. Those documents were submitted to (or created by) the BIA in carrying out the United States' obligations as trustee for the tribal water rights potentially affected by the operation of the Klamath Project. The fact that DOI must also take into account the interests of other water users in exercising ultimate decisionmaking authority with respect to the KPOP

does not alter the duty of loyalty to the Tribes owed by the agency acting in its fiduciary role.

ARGUMENT

The documents at issue in this case were intended to assist the Bureau of Indian Affairs in performing its responsibility to manage and protect tribal water rights held in trust by the United States. "It is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987); accord, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 225 (1983) ("[A] fiduciary relationship necessarily arises when the Government assumes * * * elaborate control over * * * property belonging to Indians."); see *id.* at 224-226. The government's "conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942).

Under established trust principles, "[t]he trustee is under a duty to the beneficiary not to disclose to a third person information which he has acquired as trustee where he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary." Restatement (Second) of Trusts § 170 cmt. s (1959). The "direct interest" test announced by the court of appeals permits use of the FOIA as a means by which federal officials may be compelled to breach that obligation on a regular basis. Because an Indian Tribe will always have a "direct interest" in the government's performance of its fiduciary responsibilities with respect to resources that the United States holds in trust for the Tribe, the court of appeals' construction of Exemption 5 effectively compels federal officials to violate a duty of confidentiality that has traditionally been regarded as integral to any trust relationship. Absent the clearest

evidence of congressional intent, the FOIA should not be read to require such a deviation from traditional fiduciary standards.

As we explain below, no such evidence exists. To the contrary, the text and history of the FOIA, and judicial decisions interpreting the Act, reflect a recognition that FOIA's general rule of agency disclosure should not be applied in so rigid a fashion as to subvert the effective performance of governmental functions.

I. EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT MAY UNDER APPROPRIATE CIRCUMSTANCES BE INVOKED TO PROTECT FROM COMPELLED DISCLOSURE DOCUMENTS CREATED BY PERSONS OUTSIDE THE FEDERAL GOVERNMENT

A. The History And Purpose Of Exemption 5 Support Its Application To Documents Created Outside The Government When Compelled Disclosure Would Impair The Agency's Decisionmaking Processes And Its Performance Of Representational Functions

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. IV 1998), generally mandates disclosure upon request of records held by an agency of the federal government. Section 552(b), however, provides that the Act "does not apply to" nine enumerated categories of records. Although the FOIA reflects "a general philosophy of full agency disclosure," *Department of the Air Force* v. *Rose*, 425 U.S. 352, 360 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)), this Court "has recognized that the statutory exemptions are intended to have meaningful reach and application," *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). Because "Congress realized that legitimate governmental and private interests could be harmed by

release of certain types of information," it provided "specific exemptions under which disclosure could be refused." *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982). Congress thereby sought "to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966); see *John Doe Agency*, 493 U.S. at 152.

FOIA Exemption 5, 5 U.S.C. 552(b)(5), authorizes an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption 5 "codifies the traditional common law privileges afforded certain documents in the context of civil litigation and discovery." *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. Off. Legal Counsel 481, 490 (1982); see *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984) ("Exemption 5 simply incorporates civil discovery privileges."); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) ("[I]t is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context."). The House Report accompanying the FOIA explained the purpose of Exemption 5 as follows:

> Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before

it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. [The Act] exempts from disclosure material "which would not be available by law to a private party in litigation with the agency." Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public.

H.R. Rep. No. 1497, *supra*, at 10. The Senate Report is to the same effect. See S. Rep. No. 813, *supra*, at 9.

The Committee Reports' emphasis on the need for frank exchanges of ideas within the government suggests a particular focus on the "deliberative process" privilege—a privilege unique to the government that protects "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Sears, Roebuck*, 421 U.S. at 150 (quoting *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd *sub nom. V.E.B. Carl Zeiss* v. *Clark*, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967)); see also *EPA* v. *Mink*, 410 U.S. 73, 86 (1973) ("Congress intended [in Exemption 5] to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions . . . are privileged from inspection.'") (quoting *Kaiser Aluminum & Chem. Corp.* v. *United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (Reed, J.)). As the Court observed in *Weber Aircraft*, the legislative history of Exemption 5 "recognizes a need for claims of privilege when confidentiality is necessary to ensure frank and open discussion and hence efficient governmental operations." 465 U.S. at 802. In addition to

documents used in internal agency deliberations, however, Exemption 5 protects materials covered by the attorney-client and attorney-work-product privileges. See S. Rep. No. 813, *supra*, at 2 (materials protected by Exemption 5 "would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties"); *FTC* v. *Grolier, Inc.*, 462 U.S. 19 (1983) (work product); *Sears, Roebuck*, 421 U.S. at 154-155 (same).

2. The courts of appeals have frequently considered the status of records that were submitted by consultants or others outside an agency but that played essentially the same role in the agency's decisionmaking process as documents prepared by an agency employee. The courts have consistently held that such documents were properly treated as "inter-agency or intra-agency memorandums" or letters within the meaning of Exemption 5. See, *e.g.*, *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168, 170 (D.C. Cir. 1997); *Formaldehyde Inst.* v. *Department of Health & Human Servs.*, 889 F.2d 1118, 1122-1125 (D.C. Cir. 1989); *Ryan* v. *Department of Justice*, 617 F.2d 781, 789-791 (D.C. Cir. 1980); *Hoover* v. *United States Dep't of the Interior*, 611 F.2d 1132, 1137-1138 (5th Cir. 1980); *Lead Indus. Ass'n* v. *OSHA*, 610 F.2d 70, 83 (2d Cir. 1979); *Wu* v. *National Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972); *Soucie* v. *David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); cf. *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1159-1162 (D.C. Cir. 1987) (applying same principle to discovery request in administrative adjudication), cert. denied, 485 U.S. 977 (1988).

Those consistent rulings of the courts of appeals are supported by the background of Exemption 5. When Congress expanded the language of Exemption 5 beyond the original Senate proposal that would have limited the Exemption to documents "dealing solely with matters of law and policy," it

did so in direct response to concerns expressed by government witnesses who testified at congressional hearings. See *Mink*, 410 U.S. at 90-91 & nn. 17-18. Those witnesses recommended, *inter alia*, that Exemption 5 should incorporate the privilege recognized in *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963), which held that statements furnished by outside parties to aircraft safety investigators are privileged. See *Weber Aircraft*, 465 U.S. at 803 n.22 (citing *Administrative Procedure Act: Hearings Before the Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 196, 206, 366-367, 418 (1965)).

In *Weber Aircraft*, the requester argued that "intra-agency memorandums or letters" cannot include statements made by civilians to Air Force personnel. 465 U.S. at 798 n.13. The Court did not resolve the question, however, because the material at issue included only statements by Air Force personnel. *Ibid.* However, *Machin* itself involved statements furnished by persons outside the government. See *Machin*, 316 F.2d at 339. Moreover, the House Report on the FOIA stated, in reference to Exemption 5, that "a Government agency cannot always operate effectively if it is required to disclose documents or information which it has *received or* generated before it completes the process of awarding a contract or issuing an order, decision or regulation." H.R. Rep. No. 1497, *supra*, at 10 (emphasis added). The reference to documents "received" by an agency reinforces the conclusion that materials submitted by consultants or others outside the agency are protected by Exemption 5 in appropriate circumstances.

In *Soucie*, the District of Columbia Circuit explained why documents submitted by a person outside the agency as part of the agency's internal deliberative processes are properly protected by Exemption 5 where a recognized privilege applies:

> The rationale of the exemption for internal communications indicates that the exemption should be available in connection with the Garwin Report even if it was prepared for an agency by outside experts. The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity. A document like the Garwin Report should therefore be treated as an intra-agency memorandum of the agency which solicited it.

Soucie, 448 F.2d at 1078 n.44.[7]

In 1974, Congress substantially amended the FOIA to address perceived deficiencies in the procedures by which the Act had been administered. See Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561; H.R. Rep. No. 876, 93d Cong., 2d Sess. 2 (1974) (explaining that the amendments "seek[] to strengthen the procedural aspects of the [FOIA] by several amendments which clarify certain provisions of the Act, improve its administration, and expedite the hand-

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[7] If Exemption 5 were inapplicable to all documents that circulate outside an "agency," the Exemption could not be used to protect advisory memoranda prepared for the President himself and retained in agency files, since the President is not a FOIA "agency." See *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992) (President is not an "agency" within the meaning of 5 U.S.C. 551(1)); *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980) (notes prepared by an Assistant to the President are not "agency records" subject to the FOIA); pp. 24-25 & note 8, *infra*. Such a reading of Exemption 5 would be both bizarre on its face and squarely inconsistent with the Court's disposition of *EPA* v. *Mink*, 410 U.S. 73 (1973). In *Mink* the Court considered the application of (*inter alia*) Exemption 5 to documents prepared and submitted to the President by agency officials at the President's direction. See *id.* at 76-77. The Court found it "beyond question * * * that all of the documents involved in this litigation are 'inter-agency or intra-agency' memoranda or 'letters' that were used in the decisionmaking processes of the Executive Branch." *Id.* at 85.

ling of requests for information from Federal agencies in order to contribute to the fuller and faster release of information"). The legislative history of those amendments reflects Congress's general approval of the manner in which courts had construed the Act's substantive provisions. Thus, the Senate Report stated that "there have been over 200 court cases involving the Act. From these cases has grown a full body of case law, resolving ambiguities and settling upon interpretations generally consistent with the spirit of disclosure reflected by the passage of the FOIA and with the specific intent of Congress in drafting the law." S. Rep. No. 854, 93d Cong., 2d Sess. 7 (1974).

Inter alia, the 1974 amendments defined the term "agency" to "include[] any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the executive Office of the President), or any independent regulatory agency." Pub. L. No. 93-502, § 3, 88 Stat. 1564 (currently codified at 5 U.S.C. 552(f)(1)). The Conference Report stated that

> [w]ith respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in *Soucie* v. *David*, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 15 (1974).[8] The Senate Report also expressed approval of the *Soucie* court's

[8] In *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), the Court relied on that passage of the 1974 Conference Report in holding that telephone notes prepared by Henry Kissinger while serving as Assistant to the President were not "agency records" within the meaning of the FOIA. See note 7, *supra*.

construction of the term "agency." See S. Rep. No. 854, *supra*, at 33. Congress's express endorsement in 1974 of that aspect of *Soucie*, together with its general approval of prior judicial decisions construing the statutory exemptions, further reinforces the soundness of the *Soucie* court's determination that a document prepared by outside consultants could under appropriate circumstances "be treated as an intra-agency memorandum of the agency which solicited it." 448 F.2d at 1078 n.44.[9]

B. Construing The Term "Intra-Agency Memorandums Or Letters" To Cover Certain Documents Submitted By Persons Outside The Government Is Consistent With Established Principles Of FOIA Administration

Established principles of FOIA administration support the consistent holdings of the courts of appeals that documents created outside the government may, under appropriate circumstances, be withheld under Exemption 5. That approach accommodates the practical need of government to obtain advice and expertise from outside sources; it prevents the use of the FOIA to circumvent established discovery privileges; and it ensures that the government can perform in the normal manner functions (such as trust or other representational functions) that have traditionally entailed a duty of confidentiality.

1. This Court has emphasized that the FOIA should be construed in a practical manner designed to establish work-

[9] Congress reenacted the definition of "agency" again in 1996, again without overruling or expressing any disapproval of what was by then a substantial body of precedent (cited at pp. 21, *supra*) holding that documents received by an agency from persons outside the government who serve in a governmentally conferred capacity are properly regarded as "intra-agency memorandums or letters." See Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 3, 110 Stat. 3049.

able rules. In *John Doe Agency*, for example, the Court held that Exemption 7 (5 U.S.C. 552(b)(7)), which governs information compiled for law enforcement purposes, "is not to be construed in a nonfunctional way." 493 U.S. at 157. This Court observed that it "consistently has taken a practical approach when it has been confronted with an issue of interpretation of the Act. [The Court] has endeavored to apply a workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure." *Ibid.* See also, *e.g.*, *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 776-780 (1989); *FBI* v. *Abramson*, 456 U.S. 615, 623-629 (1982); *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 599-602 (1982).

Consistent with this Court's emphasis upon the need to accommodate the practical exigencies of government, the courts of appeals in applying Exemption 5 have recognized that public disclosure of documents created outside the federal government, and then provided to agency officials at the agency's request or as part of an established relationship, may cause the same harms as public disclosure of agency-generated records. The District of Columbia Circuit has observed that "[i]n the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of the deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions." *Ryan*, 617 F.2d at 789-790. The use of outside consultants is particularly appropriate in situations where some form of specialized expertise is not readily available within the federal government. "If it is to effectively deliberate, an agency may need or want to 'enlist the help of outside experts skilled at unraveling [the] knotty

complexities' of 'problems outside their ken.'" *Public Citizen*, 111 F.3d at 171 (quoting *CNA Fin. Corp.*, 830 F.2d at 1162). That expertise will be more difficult to obtain if a prospective consultant cannot be assured the same degree of confidentiality as would an agency employee. See *Soucie*, 448 F.2d at 1078 n.44 (explaining that "[t]he rationale of the exemption for internal communications" applies to some documents created outside the agency because "[t]he Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity").

This Court employed a similar mode of analysis in *Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989). The Court held in that case that the Federal Advisory Committee Act (FACA) did not apply to consultations between the Justice Department and the American Bar Association's Standing Committee on Federal Judiciary regarding potential nominees for federal judgeships. The Court acknowledged that "a literalistic reading of [the relevant FACA provision] would bring the Justice Department's advisory relationship with the ABA Committee within FACA's terms," but it concluded that "[a] literalistic reading * * * would catch far more groups and consulting arrangements than Congress could conceivably have intended." *Id.* at 463-464. The Court also explained that a narrow construction of the Act would avoid the constitutional difficulties that a broader reading would entail. *Id.* at 465-466.[10] Like the

[10] We do not contend that compelled disclosure of the documents at issue in this case would violate the Constitution. As we explain below, however, compelled release of tribal submissions bearing on the United States' performance of its trust responsibilities would cause the government to depart drastically from established fiduciary standards. The prospect of such deviations from traditional practice is itself a basis for judicial caution.

courts of appeals that have given a "functional" reading to the introductory language of Exemption 5, this Court in *Public Citizen* declined, in the absence of clear evidence of congressional intent, to permit the FACA's use as a means of sweeping intrusion on the government's ability to obtain confidential advice and expertise from outside consultants.

2. This Court has "consistently rejected * * * a construction of the FOIA" under which parties could "obtain through the FOIA material that is normally privileged." *Weber Aircraft*, 465 U.S. at 801. Such an interpretation "would create an anomaly in that the FOIA could be used to supplement civil discovery." *Ibid.* An unduly narrow construction of the term "intra-agency," however, would have precisely that effect. In the instant case, for example, both the magistrate judge and the district court concluded that the seven documents at issue are protected by the deliberative process and/or attorney-work-product privilege. See p. 12, *supra*. The court of appeals did not disagree with or even address that holding, but it nevertheless ordered that the documents be released, on the ground that the documents did not fall within the threshold description of "inter-agency or intra-agency memorandums or letters." That approach cannot be squared with this Court's consistent practice of construing such threshold descriptions of the types of records that are potentially eligible for protection under a particular FOIA exemption in a manner that guards against the type of harm that the substantive standard for withholding under that exemption was intended to prevent. See, *e.g.*, *John Doe Agency*, 493 U.S. at 478 (Exemption 7); *Abramson*, 456 U.S. at 628-629 (Exemption 7); *Washington Post*, 456 U.S. at 601 (Exemption 6).

3. This Court has consistently expressed "reluctance to construe the FOIA as silently departing from prior long-standing practice." *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 154 (1980) (citing

Renegotiation Bd. v. *Bannercraft Clothing Co.*, 415 U.S. 1, 22 (1974), and *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 237 (1978)). The FOIA is intended to cast light on existing government practices; it should not be interpreted and applied so as to compel federal agencies to perform their assigned substantive functions in other than the normal manner. In some instances, however, a requirement that information obtained from outside the government must be publicly disclosed would alter the essential character of the underlying agency function. Where (for example) federal officials are assigned trust or representational duties with respect to persons outside the government, it should ordinarily be assumed that those officials will be guided by the same principles that apply to trustees or representatives generally. If performance of such a function would ordinarily entail a duty of confidentiality, the FOIA should not lightly be construed to require the relevant federal officials to breach that obligation. See pp. 36-37, *infra*.

For that reason, the interpretation of Exemption 5 adopted by the court of appeals has potentially serious adverse implications for cases in which federal attorneys represent individual current and former federal employees who have been sued in their personal capacities. See 28 C.F.R. 50.15(a) (authorizing Department of Justice representation in specified circumstances of current and former federal employees sued in their individual capacities). Department of Justice regulations provide that in such cases "[a]ny adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee." 28 C.F.R. 50.15(a)(3); see *In re Grand Jury Supoena Duces Tecum*, 112 F.3d 910, 921 n.10 (8th Cir.) ("In such a case, the government

attorney enters into a personal attorney-client relationship with the individual defendant, and the usual privilege applies."), cert. denied, 521 U.S. 1105 (1997). A military defense attorney is subject to a similar duty of confidentiality. See Rule for Courts-Martial 502(d)(6) cmt. B ("Defense counsel must * * * represent the accused with undivided fidelity and may not disclose the accused's secrets or confidences except as the accused may authorize."); Mil. R. Evid. 502 (recognizing lawyer-client privilege).

Because the individual employee or service member represented by a government lawyer has an obvious "direct interest" (Pet. App. 8a) in government counsel's performance of his representational function, the court of appeals' decision casts significant doubt on the applicability of Exemption 5 to communications between the attorney and client. To construe Exemption 5 as excluding such materials from protection would plainly be at odds with Congress's evident intent to prevent use of the FOIA to circumvent established discovery privileges. Where federal officials are assigned by law to perform representational functions on behalf of persons outside the government, the FOIA should not be read to require substantial deviation from the manner in which those functions are traditionally performed.

4. a. In defining the circumstances under which documents generated outside the government may properly be regarded as "intra-agency memorandums or letters," the courts of appeals have typically focused on whether the source of the relevant records is an appropriate person for the federal government to consult with respect to the matter to which the documents pertain. In *Public Citizen*, the court of appeals held that Exemption 5 applied to communications between the National Archives and former President Bush, pursuant to the Presidential Records Act of 1978, 44 U.S.C. 2201 *et seq.*, concerning the appropriate disposition of the former President's records. 111 F.3d at 170-172. The court

stated that "[c]onsultations under the Presidential Records Act are precisely the type that Exemption 5 was designed to protect." *Id.* at 171. It explained that an agency may sometimes require the assistance of outside experts and that "[t]he former President clearly qualifies as an expert on the implications of disclosure of Presidential records from his administration." *Ibid.*

In determining whether a party may appropriately be treated for these purposes as a confidential consultant to agency officials, two criteria are especially significant. The first is whether a basic congruence of interests exists between the agency and the putative consultant. The second is whether the agency is obligated by law or has reasonably undertaken to accord a special duty of loyalty, protection, or respect to the person who created the documents.[11] In

[11] Courts have applied a similar standard in addressing the question whether an agency, by disclosing the contents of documents to selected persons outside the government, waives any privilege against general disclosure that might otherwise be available. The analysis in such cases has focused on whether disclosure to a particular recipient serves legitimate governmental interests that would not be served by disclosure to the public at large. Compare *Cooper* v. *Department of the Navy*, 558 F.2d 274, 278 (5th Cir. 1977) ("such limited disclosures to proper outside persons as are necessary to carry out effectively a purpose for assembling a governmental report in the first place do not waive the privilege"); *Badhwar* v. *United States Department of Air Force*, 629 F. Supp. 478, 480-481 (D.D.C. 1986) (applying *Cooper* standard), aff'd, 829 F.2d 182 (D.C. Cir. 1987), with *Education/Instruccion, Inc.* v. *United States Department of Housing and Urban Development*, 471 F. Supp. 1074, 1081 (D. Mass. 1979) ("at least in those circumstances where an authorized disclosure is made to a non-federal party and such disclosure is not necessary to effect the purposes of the document, any claim of an exemption under [Exemption] 5 is waived"); cf. *Aviation Consumer Action Project* v. *Washburn*, 535 F.2d 101, 107-108 (D.C. Cir. 1976) (requested reports were "intra-agency memorandums" within the meaning of Exemption 5, notwithstanding their release to an advisory committee established pursuant to the Federal Advisory Committee Act).

Public Citizen, for example, the requisite congruence of interests and duty of respect and deference were established both by the former President's prior service as Chief Executive and by the Presidential Records Act itself, which mandated consultation with the former President.

b. This Court's decision in *Federal Open Market Committee* v. *Merrill*, 443 U.S. 340 (1979), identifies an additional consideration relevant to the question whether particular documents are "intra-agency" records within the meaning of Exemption 5. The Court held in that case that Domestic Policy Directives prepared by the Federal Open Market Committee (FOMC) were covered by Exemption 5. The Directives set forth the Committee's instructions to the Account Manager of the System Open Market Account regarding the manner in which the Account's assets are to be managed. *Id.* at 344-346. In analyzing the application of Exemption 5 to the Policy Directives, the Court first explained:

> There can be little doubt that the FOMC's Domestic Policy Directives constitute "inter-agency or intra-agency memorandums or letters." FOMC is clearly an "agency" as that term is defined in the Administrative Procedure Act. 5 U.S.C. §§ 551(1), 552(e). And the Domestic Policy Directives are essentially the FOMC's written instructions to the Account Manager, a subordinate official of the agency. These instructions, although possibly of interest to members of the public, are binding only upon the Account Manager. The Directives do not establish rules that govern the adjudication of individual rights, nor do they require particular conduct or forbearance by any member of the public. They are thus "intra-agency memorandums" within the meaning of Exemption 5.

Id. at 352-353. The Court's analysis suggests that the "intra-agency" character of particular records may be informed in part by whether the documents are intended for the internal assistance or guidance of agency officials (as distinguished from documents that articulate rules of conduct binding on persons outside the government).[12]

The records at issue in this case satisfy both those criteria and are therefore "intra-agency memorandums or letters" within the meaning of Exemption 5. As we explain below, because the United States holds tribal lands and natural resources in trust for their benefit, the Tribes and the government share a basic congruence of interests regarding the protection and management of the relevant property. Moreover, the United States' acceptance of trust responsibilities for tribal property logically and historically entails a special duty of loyalty and respect. Finally, the documents are intended to assist federal officials in the performance of their duties and do not purport to establish norms binding on any person outside the government. The Tribes are therefore particularly appropriate "consultants" with respect to the BIA's performance of its trust responsibilities.

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[12] The Court's analysis in *Federal Open Market Committee* is consistent with the more general principle that the FOIA should be applied in a manner that prevents the development of "secret law." See *Sears, Roebuck*, 421 U.S. at 152-153. That concern will rarely if ever be implicated by withholding of documents created outside the government, since those submissions (unless and until expressly endorsed by the responsible government officials) cannot be thought to "constitute the 'working law' of the agency." *Id.* at 153.

II. THE DOCUMENTS AT ISSUE IN THIS CASE ARE PROPERLY TREATED AS "INTRA-AGENCY MEMORANDUMS OR LETTERS" WITHIN THE MEANING OF EXEMPTION 5

A. Compelled Disclosure Of Documents Like Those At Issue In This Case Would Impair The United States' Performance Of Its Trust Responsibilities

1. As we explain above (see pp. 4-6, *supra*), the United States in managing and protecting tribal property acts in a fiduciary capacity, and its duties to the Tribe concerned are largely comparable to those of a private trustee. Pursuant to that trust responsibility and various Executive Branch directives, federal agencies have long consulted with Indian Tribes to obtain technical information, legal analysis, or tribal perspectives that may assist in the protection of the Tribes' trust resources. In order properly to perform its functions, the government must receive candid, unfiltered communications from the Tribes concerning issues that bear on the management and protection of trust resources. Under the court of appeals' decision, however, Indian Tribes will face a Hobson's choice: they may keep from their own representative important litigation or policy information that is necessary to the effective performance of the government's trust responsibilities, or they may disclose that information to the trustee and face a substantial risk of public disclosure. In either event, the government's ability to perform its assigned functions will be greatly impaired.

1. The ability of the United States to receive candid advice and information from Tribes is integral to the government's performance of its trust responsibilities.[13] Consistent

[13] For over half a century, federal policy has favored a broad right of tribal self-government and self-determination. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 553 (1974) (explaining that "Congress in 1934

with that understanding, DOI's Departmental Manual mandates consultation with Tribes whenever their trust resources may be affected by the Department's actions. J.A. 55, 57-58. The Manual further provides that "[i]nformation received shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position." J.A. 58.

The prospect of public disclosure would adversely affect the nature of the Tribes' submissions to federal officials regarding the management of trust resources. For example, in some instances, a Tribe or individual Indian beneficiary

determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies" because "[t]he overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests."); *Oklahoma Tax Comm'n* v. *Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (relevant federal statutes "reflect Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development") (internal quotation marks omitted); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 62 (1978). In the Indian Self-Determination and Education Assistance Act, for example,

> Congress declare[d] its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. 450a(b). Consultation with Tribes regarding the United States' performance of its trust responsibilities substantially furthers the federal policy favoring tribal self-government and self-determination, by ensuring that tribal perspectives are fully considered by federal officials charged with managing and protecting property held in trust for the Tribes.

might choose to forgo such communications altogether. In other instances, they might decline to make submissions in writing, thereby undermining the accuracy, comprehensiveness, and efficiency of communications. Compare *Hickman* v. *Taylor*, 329 U.S. 496, 511 (1947) (quoted at note 18, infra) ("Were such material open to opposing counsel on mere demand, much of what is now put in writing would remain unwritten."). And even where communications (or written communications) would not be chilled altogether, the prospect of mandatory public disclosure could be expected to cause tribal submissions to be less candid, less nuanced, and consequently less helpful to federal officials in carrying out the government's trust responsibilities. Federal officials would be deprived of critical expertise and the beneficiaries' perspective concerning trust resources that are vital to the well-being of the Indians; they might be forced to duplicate pertinent research at government expense; and their ability to manage and protect the trust property would be compromised. That prospect directly implicates the interests that Exemption 5 is intended to protect. Compare *Sears, Roebuck*, 421 U.S. at 150 (Exemption 5 reflects the concern that "the frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public; and the decisions and policies formulated would be the poorer as a result") (internal quotation marks omitted).

2. Even if there were somehow grounds for believing that the content of tribal submissions to the federal government would be unaffected by the prospect of public disclosure, compelled release nevertheless would impair the BIA's performance of the functions assigned to it. As we explain above, a "trustee is under a duty to the beneficiary not to disclose to a third person information which he has acquired as trustee where he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary." Restatement (Second) of Trusts § 170 cmt. s

(1959). If their submissions to the BIA were subject to mandatory disclosure under the FOIA, Tribes and individual Indians who continue to provide the government with advice and information concerning trust resources might receive representation that falls short of traditional fiduciary standards, since federal officials will be unable to guarantee the confidentiality that a trust relationship ordinarily entails. Indiscriminate public disclosure of a Tribe's communications would itself be a significant breach of the trustee's duties, quite apart from any deterrent effect it would have on the Tribe's future willingness to provide full and candid submissions.

3. The harm caused by a public disclosure requirement in this context is not visited upon the Tribes and tribal members alone. This Court has repeatedly recognized the substantial public and governmental interest in the United States' fulfillment of its trust responsibilities regarding Indian property. See, *e.g.*, *United States* v. *Candelaria*, 271 U.S. 432, 443-444 (1926); *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926); *Heckman* v. *United States*, 224 U.S. 413, 437 (1912). Indeed, because the United States holds legal title to the trust resources of Tribes and individual Indians, the documents at issue in this case bear directly on the appropriate management of *federal* property. The rule announced by the court of appeals in this case therefore would significantly impair the ability of the responsible officials of the United States government to vindicate important federal interests. Cf. *General Tel. Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 326 (1980) ("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.").[14]

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[14] As we have explained (p. 7, *supra*), DOI's Departmental Manual states that agency policy is "to consult with tribes on a government-to-

B. The Court Of Appeals Erred In Invoking The Tribes' "Direct Interest" In The Management Of Trust Property As A Basis For Declining To Apply Exemption 5

As we explain above (see pp. 21, 26-27, *supra*), the courts of appeals in construing Exemption 5 have applied a "functional test" that focuses on the role a document plays in the agency's performance of its assigned responsibilities, and on whether the document's public disclosure would result in harms comparable to those caused by release of agency-created records. The court of appeals in the instant case found those precedents to be inapposite because "the Tribes with whom the [DOI] has a consulting relationship have a direct interest in the subject matter of the consultations." Pet. App. 8a. We agree that in some contexts, a private party's financial or similar stake in the outcome of a govern-

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government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety." J.A. 55. That policy statement further clarifies that the tribal submissions in this case were not foisted on an unreceptive agency, but were solicited by the DOI in order to assist the agency in its performance of trust responsibilities.

Executive Branch policy statements issued in November 1993 and April 1994 state that consultations between federal and tribal officials "are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals." J.A. 50; see J.A. 53. DOI interprets those statements to mean that federal and tribal officials (the "interested parties" to the consultations) are to deal *with each other* in an "open and candid" manner—not that the substance of the consultations is to be communicated to the public, as the court of appeals seemed to believe (see Pet. App. 10a). The Departmental Manual clarifies that information received by DOI through consultation with tribal representatives "shall be deemed confidential, unless otherwise provided by applicable law, regulations, or Administration policy, if disclosure would negatively impact upon a trust resource or compromise the trustee's legal position in anticipation of or during administrative proceedings or litigation on behalf of tribal government(s)." J.A. 58; see p. 7, *supra*.

ment decision might create a sufficient divergence of interests between himself and the government that the agency could not reasonably enter into a confidential consultancy relationship with the party.[15] As applied to federal officials' performance of trust or similar representational duties, however, the court of appeals' reasoning is deeply flawed.

As we explain above (see pp. 29-30, *supra*), when federal officials are assigned to perform fiduciary or other representational functions that have historically entailed a duty of confidentiality, the parties to that relationship will have a mutual expectation that the government will carry out those functions in accordance with established standards. A duty to maintain the confidentiality of information acquired in administering a trust where disclosure would disserve the beneficiary's interests has traditionally been an integral feature of the trustee's responsibilities. The beneficiary's

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[15] In many situations (notice-and-comment rulemaking, see 5 U.S.C. 553, being the most obvious example), federal agencies solicit recommendations from interested parties as to the course of action the government should take. Such recommendations often assist the agencies involved to obtain a fuller understanding of the potential practical and legal consequences of their decisions. We do not contend, however, that those submissions can be treated as "intra-agency memorandums or letters" simply because they contribute to the agency's decisionmaking process.

This Court has long recognized, however, that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). In its role *as trustee* for tribal natural resources, the United States is subject to a duty of loyalty separate and distinct from (though not inconsistent with) the general obligation of the Executive Branch to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. To say that the government's role as trustee entails a duty of confidentiality does not suggest that communications from all persons seeking favorable treatment from the government are exempt from disclosure under the FOIA.

interest in the trust property, and the trustee's duty to protect that interest, form the essence of the trust relationship. To put it another way, the trustee's distinct responsibilities—including the duty of confidentiality—run precisely to those persons having an interest in the trust corpus. It is therefore perverse to treat the Klamath Tribes' "direct interest" in the protection and quantification of their water rights within the Klamath Basin as a ground for public disclosure of communications made by the Tribes to the BIA when acting in fulfillment of the United States' responsibilities as trustee for tribal property.[16]

In its capacity as trustee, the United States owes a duty of loyalty to Indian Tribes, resulting from the unique legal relationship—emanating from the Constitution and congressional mandates and recognized for nearly two centuries by this Court—in which the United States holds the lands and associated resources of Tribes (and individual Indians) in trust for their benefit. Because a Tribe's communications with the government concerning trust resources are integral to its "governmentally conferred capacity," *United States Department of Justice* v. *Julian*, 486 U.S. 1, 18 n.1 (1988)

[16] Although an agency's relationship with an outside consultant is typically formed on an ad hoc basis at the discretion of the agency, the BIA's relationship with Indian Tribes concerning trust property is enduring and arises by operation of law. Confidential treatment of tribal submissions relating to trust resources recognizes the Tribes' enduring interest in the integrity of that relationship, in addition to the governmental interest in receiving candid advice that generally underlies (see pp. 26-27, *supra*) the application of Exemption 5 to documents submitted by an outside consultant. For that reason it was especially inappropriate for the court of appeals to afford communications with Indian Tribes concerning their trust property a dignity less than that of communications with ordinary consultants, based on the court's view of a factor—the Tribes' interest in their trust resources—that is the very foundation for the relationship and the very reason why the BIA solicits the Tribes' advice and assistance.

(Scalia, J., dissenting) (see pp. 3-4, *supra*), as trust beneficiary, a basic congruence of interests is inherent in the trust relationship. Indeed, a Tribe's "direct interest" in the trust property makes it a particularly appropriate "consultant" with respect to the BIA's performance of its trust responsibilities. That is particularly so in light of the federal government's increasing commitment to principles of tribal self-determination, prompted by the growing recognition that the Tribe is most often the best judge of its own interests. See note 13, *supra*.[17]

[17] The plaintiff in *Public Citizen* (see pp. 30-31, *supra*) contended that the records in question were subject to disclosure because "the former President has a distinct and independent interest that makes him an adversary rather than a consultant." 111 F.3d at 171. The court acknowledged that "a former President's power to assert his rights and privileges * * * constitutes an independent interest." *Ibid.* The court held, however, that neither "[t]he existence of independent presidential interests" nor the possibility of future conflict between the former President and the Archivist was sufficient to negate the consultative relationship. *Ibid.* It observed in that regard that "[d]octors, lawyers and other expert advisors may find themselves in litigation as either plaintiffs or defendants against those whom they advise (e.g., breach of contract and malpractice claims), but for all that they are still consultants." *Ibid.*

Similarly here, the mere possibility that an Indian Tribe might be dissatisfied with the government's performance of its duties as trustee in a particular instance in the future should not obscure the basic congruence of interests that is inherent in the trust relationship. To the contrary, a Tribe—like the former President in *Public Citizen*—is an especially valuable and appropriate consultant in this setting because it "clearly qualifies as an expert on the implications of" the government's decisions regarding the management and protection of trust property. See 111 F.3d at 171. As the dissenting judge in the instant case explained, "[t]he mandated consideration that the Bureau and Department have to give to the Klamath Basin Tribes' claims virtually requires that they consult the Tribes, much as the Archivist consulted the ex-President, to seek their peculiar expertise concerning their rights." Pet. App. 25a.

C. The Records At Issue Here Are Not Properly Characterized As "Ex Parte Communications"

The court of appeals also stated that to permit withholding of the documents at issue in this case "would extend Exemption 5 to shield what amount to ex parte communications in contested proceedings between the Tribes and the [DOI]." Pet. App. 10a. That reasoning, too, is flawed.

1. The error in the court of appeals' analysis is particularly clear with respect to the documents pertaining to the Oregon general stream adjudication. In that proceeding, the federal government is not the decisionmaker; its role is limited to the presentation of claims (on its own behalf and on behalf of Tribes) for ultimate resolution by state officials. See *United States* v. *Oregon*, 44 F.3d 758, 762-764 (9th Cir. 1994) (describing procedures to be employed in the state adjudication), cert. denied, 516 U.S. 943 (1995). As the dissenting judge explained, the court of appeals' analysis "fails to recognize * * * that at least four of the seven documents were used by the Bureau and the Department to prepare to represent the Tribes' claims in the Oregon water rights adjudication—not a proceeding which either the Bureau, or the Interior Department, has the authority to 'resolve.'" Pet. App. 23a n.4. Submissions intended to assist federal officials in their performance of representational functions before a state adjudicative body cannot sensibly be characterized as "ex parte communications."

Consistent with its trust obligation, the United States has historically represented the interests of the Tribes in disputes over their property and natural resources, including water rights. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 113, 116, 127 (1983); *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 812-813 (1976); *Arizona* v. *California*, 373 U.S. 546, 595-601 (1963); *United States* v. *Powers*, 305 U.S. 527, 528 (1939); *Winters* v. *United States*, 207 U.S. 564, 576 (1908). Effective representation in that setting requires the exchange of communications between federal and tribal officials in furtherance of the common purpose of protecting the Tribes' resources. Common law doctrine protecting exchanges of information between parties with a common interest in litigation "has been recognized in cases spanning more than a century." *United States* v. *McPartlin*, 595 F.2d 1321, 1336 (7th Cir.), cert. denied, 444 U.S. 833 (1979); see also *United States* v. *Schwimmer*, 892 F.2d 237, 243-244 (2d Cir. 1989); *United States* v. *American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). That privilege is specifically recognized in the Oregon Evidence Code and therefore will presumably be available in the state water-rights adjudication. See Or. Rev. Stat. § 40.225 (1997), Or. Evid. Code R.503(2)(c) (recognizing privilege for communications "[b]y the client or the client's lawyer to a lawyer representing another in a matter of common interest").

The court of appeals' decision places the Klamath Tribes at a distinct disadvantage vis-à-vis other claimants in the Oregon adjudication. Under the court's ruling, the Tribes' communications to their representative (the United States) will be subject to compelled disclosure under the FOIA, without regard to the applicability of any traditional discovery privilege. Opposing claimants in the state proceeding, by contrast, may continue to assert all available privileges with regard to documents passing between themselves and their own representatives. Such a regime would facilitate the use of the FOIA "to supplement civil discovery"—a result that this Court has "consistently rejected." *Weber Aircraft Corp.*, 465 U.S. at 801; see p. 28, *supra*.[18]

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[18] The attorney-work-product privilege in particular has historically served to protect counsel against intrusive inquiries from their opponents

Although the rule adopted by the court of appeals would substantially disrupt the federal-tribal trust relationship in a variety of settings, its impact on litigation concerning tribal resources would be especially deleterious. The United States is currently representing tribal interests in litigation in 122 cases. In the course of litigation and negotiations concerning trust resources, the BIA and the Justice Depart-

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in litigation. As the Court explained in *Hickman* v. *Taylor*, 329 U.S. 495 (1947):

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id. at 510-511; see also *id.* at 516 (Jackson, J., concurring) ("I can think of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him."). As the discussion quoted above makes clear, moreover, the attorney-work-product privilege as it applies to federal lawyers is by its nature often likely to involve information obtained from outside the government.

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to the Tribe" by representing competing interests in the earlier adjudication. *Id.* at 141. This Court disagreed, explaining that

> where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation lands within a project, the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.

Id. at 142. The Court held that "the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the final decree entered in the [prior] suit," notwithstanding the fact that both interests were represented by the United States in the earlier proceeding. *Id.* at 143. The Court thus recognized that the United States government's duty to consider and advance a variety of interests necessarily coexists with its obligation as trustee to represent Indian Tribes and protect tribal property rights.

In the instant case, the documents pertaining to the KPOP were submitted to (or created by) the BIA in carrying out the United States' obligations as trustee for the tribal water rights potentially affected by the operation of the Klamath Project. The Court in *Nevada* v. *United States* observed that the government's trust obligations in its dealings with Indian Tribes "have been traditionally focused on the Bureau of Indian Affairs." 463 U.S. at 127; see also *id.* at 135-138 n.15; *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968) (identifying the BIA as "the agency of the Department of the Interior charged with fulfilling the trust obligations of the United States"); cf. *Morton* v. *Mancari*, 417 U.S. 535, 554 (1974) (explaining that the "lives and activities" of tribal members "are governed by the BIA in a

unique fashion," and that "the legal status of the BIA is truly *sui generis*").

The fact that DOI must also take into account the interests of other water users in exercising ultimate decisionmaking authority with respect to the KPOP does not alter the duty of loyalty to the Tribes owed by the agency acting in its fiduciary role. The KPOP-related documents submitted by the Tribes were furnished to the BIA rather than to the BOR. That fact reinforces the conclusion that the documents, while assuredly relevant to DOI's performance of its ultimate decisionmaking responsibilities with respect to the KPOP, were provided to the Department *in its capacity as trustee.* The court of appeals failed to recognize that the limitation upon FOIA's overall goal of open government that the confidential trust relationship requires is simply an unavoidable consequence of the DOI's dual role as trustee for Indian Tribes and as federal policymaker. See *Nevada* v. *United States*, 463 U.S. at 127-128 (noting the DOI's often-conflicting responsibilities to act as trustee for Indian resources and to manage federal water reclamation projects); *Idaho* v. *Oregon*, 444 U.S. 380, 391 (1980) (referring to the United States' "role as trustee for the Indians" and "its role as manager of the ocean fishery and the dams"). Because the documents at issue here were submitted to (or created by) the government in its capacity as trustee, the court of appeals erred in analogizing those documents to "ex parte communications." They are, rather, communications made in an ongoing relationship of trust and confidence that serves to fulfill the commitments of the United States to the Indian Tribes—commitments that derive both from the Constitition, treaties, and laws of the United States, and from a course of dealing over the Nation's history that has, in turn, given rise to a duty of protection.

CONCLUSION

The judgment of the court of appeals should be reversed.

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